IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 6.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

SECOND APPEAL No.249 OF 1995

1.Kistammal
2.P.Chengappa Reddy
3.Munuswamy
4.Ponnuswamy
5.Rajendran
6.Anguswamy ... Appellants/Respondents/Defendants

Vs.

1.C.Krishnan
2.Indirani Ammal
3.Saradhammal
4.Nagammal
5.Mariammal ... Respondents/Appellants/Plaintiffs 2 to 6

LRs of the Deceased Plaintiff
Chengappa Reddy

Second Appeal preferred under Section 100 CPC, as against the judgment and decree dated 27.8.1993 rendered in A.S.No.20 of 1990 by the learned Subordinate Judge, Tiruvellore thereby reversing the judgment and decree dated 24.3.1988 rendered in O.S.No.593 of 1981 by the learned District Munsif, Ponneri.

For appellants : Mr.K.Prabhakran for
M/s.Subramnya Iyer,
V.Muralidharan

For respondents: Mr.S.Thiruvenkatasamy for
M/s.T.R.Rajaraman,
M.K.Sampath

JUDGMENT

The defendants are the appellants.

2. The deceased first Plaintiff, by name Chengappa Reddy, had filed the suit for declaration of his title to the suit properties and for permanent injunction. The basis for the above said reliefs are that he, being the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

sole surviving co-parcener, after the death of his brothers, prior to 1944, inherited the suit properties absolutely; that one of the brothers, by name Angusamy Reddy, sold his interest in the property, under the sale deed dated 7.7.1977. Thus tracing the title, claiming possession in himself, as if the first defendant, daughter of one of the deceased brothers, is not entitled to any right and the purchasers under her (defendants 2 to 6) are also not entitled to claim any right, the plaintiff has approached the Court for the above said reliefs, further alleging that the defendants are obstructing his enjoyment or attempting to obstruct his enjoyment, without any right whatsoever.

3. In the written statement filed by the defendants 2 to 5, adopted by the first defendant, it is contended inter alia, that the plaintiff is not entitled to claim exclusive title or interest over the suit properties, since the first defendant is also entitled to 1/3rd share, which she had sold validly, the same cannot be questioned by the plaintiff, who has no absolute title over the entire suit properties. It is the further submission in the written statement that the suit for declaration, as such, is not maintainable and if at all, the plaintiff ought to have filed the suit for partition.

4. Based upon the above pleadings, framing issues as required under the Code of Civil Procedure, the learned District Munsif, Ponneri took the case for trial. Before him, on behalf of the plaintiffs, five documents have been exhibited in addition to examination of two witnesses at the first instance and one witness after the remand. On behalf of the appellants/defendants, originally three witnesses have been examined, then, examining another witness, after remand. After the remand, two documents were also exhibited as Exs.A.6 and A.7, on behalf of the plaintiffs.

5. The trial Court, while evaluating the above materials, came to the conclusion that the plaintiffs' have failed to prove the actual date of death of Munusamy Reddy as 22.11.1935; that the claim of the deceased first plaintiff, based upon survivorship, regarding the share belonging to Munusamy Reddy, is not maintainable and that the plaintiffs 2 to 6/respondents, who are impleaded as the legal representatives of the original plaintiff, are entitled to declaration in respect of Items 1 to 9 for 2/3rd share alone, in addition to being entitled to declaration for 10th item. Thus deducing the decision, the suit came to be decreed, declaring the plaintiffs title in respect of 10th item in full and declaring plaintiffs share as 2/3rd, regarding items No.1 to 9, refusing injunction, thereby causing grievance to the plaintiffs 2 to 6, which resulted in preferring an appeal before the Sub Court, Tiruvellore in A.S.No.20 of 1990.

6. The learned Subordinate Judge, accepting the death certificate of Munuswamy marked as Ex.A.6, as correct, came to the conclusion that the brothers of the deceased first plaintiff died prior to the commencement of the Hindu Succession Act and after their death, the co-parcenery property devolved upon the remaining two brothers; that from Angusamy Reddy, the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

plaintiff had purchased half share and in this view, on survivorship, as well as on the basis of the sale deed, the deceased first plaintiff is entitled to Items 1 to 9. The first defendant, being the daughter of one of the brothers, the first appellate Court held that as the law existed then, she is not entitled to claim any share. In this view, finding fault with the conclusion reached by the trial Court, the first appellate Court allowed the appeal, setting aside the decree and judgment of the trial Court, thus granting a decree, as prayed for, in respect of items 1 to 9 also, which is under challenge in this appeal.

7. This Court, considering the rival contentions of the parties and by going through the judgments of both the Courts below, felt, the substantial questions of law, which ought to have been decided by the Courts below, were not properly considered and in this view, admitting the Second Appeal, the following Substantial Questions of Law have been framed for determination:

"1. Is the lower appellate Court justified in decreeing the suit, when Chengappa Reddy is only one of the four brothers and he can only make a claim for 1/3rd share in 1/4th share of Munuswamy Reddy?

2. Has not the lower appellate Court fallen into an error, that because Munuswamy Reddy died prior to 1956, the entire share of Munuswamy Reddy devolved on Chengappa Reddy, ignoring (1) Division of Co-parceners (2) inheritance by a daughter in the absence of a son, even according to old Hindu Law prior to Hindu Succession Act?"

8. Heard Mr.K.Prabhakaran, the learned counsel for the appellants and Mr.S.Thiruvenkatasamy for the respondents.

9. In the plaint, there are ten items of properties. As far as 10th item is concerned, there is no dispute and therefore, the grant of decree, as far as 10th item is concerned, in favour of the present plaintiffs, should sustain, not to be disturbed.

10. As far as other items are concerned, viz. Items 1 to 9, the deceased first plaintiff claimed title to them, not only on the basis that he alone was the sole surviving co-parcener, entitled to inherit the share of other brothers since they died prior to 1956, but also claimed title on the basis of the sale deed executed by one of the surviving brothers by name Angusamy on 7.7.1977, which is exhibited as Ex.A.1. The date of death of brothers, especially Munuswamy Reddy, is in dispute. The plaintiffs' in order to succeed, have to prove not only the date of death of Munuswamy Reddy, as prior to the commencement of the Hindu Succession Act, but also they have to prove that there was no division in the joint family, consisting of the deceased first plaintiff and his brothers, who were admittedly, members of co-parcenery. Even the date of death of Munusamy Reddy is proved to be prior to the commencement of the Hindu Succession Act, that alone will not solve the problem, as claimed by the learned counsel for

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the respondents, whereas it should depend upon, whether there was a division or severance in the status of the family or not, since the division or severance in status will also decide the survivorship. In order to appreciate the rival contention of the parties, the relationship between the parties has to be recapitulated.

11. It is the common case of the parties that one Govindappa Reddy had four sons, by name Munusamy Reddy i.e. the father of the first defendant and P.W.2; Chengappa Reddy-the deceased first plaintiff; Angusamy and one Ramu Reddy. Ramu Reddy died issueless and the date of death of Ramu Reddy is not given, though it is said, he died prior to 1944. Angusamy was alive, when the Hindu Succession Act, 1956 came into force. Munusamy Reddy, according to the present case, as projected under Ex.A.6, died on 25.11.1935. Chengappa Reddy, the deceased first plaintiff, as seen from the plaint, would contend that he had inherited the share of Munusamy Reddy and Ramu Reddy, by survivorship, and purchased the share of Angusamy Reddy, under Ex.A.1. If this is the case, the suit for declaration should fail and therefore, we have to see what is the pleading.

12. Plaint para 3 reads:

> "The 1st plaintiff is the absolute owner of the schedule mentioned properties. He is in possession and enjoyment as sole owner. His brother Angusamy Reddy had 1/4th share and the other two brothers Munusamy Reddy and Late Ramu Reddy had each 1/4th share. The said two brothers died prior to 1944 and the plaintiff is the sole surviving co-parcener and he is in separate and absolute enjoyment from 1944 till this date. Angusamy Reddy, who is alive sold his interest in the property, under the sale deed dated 7.7.1977. The patta for the suit lands is in the name of the 1st plaintiff. 1st plaintiff is paying the kist for the entire suit property."

From the above pleadings, it is seen that the deceased first plaintiff Chengappa Reddy claimed the shares of Munusamy Reddy and Ramu Reddy, as if he alone was the sole surviving co-parcener, which is factually incorrect, not properly considered by the Courts below, as projected in the Substantial Questions of Law, since even Angusamy Reddy was alive along with the deceased first plaintiff Chengappa Reddy.

13. It is not the case of the deceased first plaintiff, in the plaint, that there was no division in the family and all the brothers continued to live jointly, as members of co-parcenery, and he had purchased undivided share from Anguswamy Reddy, while inheriting the undivided shares of Munusamy Reddy and Ramu Reddy. The plaint would read that Angusamy Reddy had sold his interest in the property under the sale deed dated 7.7.1977 (Ex.A.1). That means, his 1/4th share alone, not half share, as incorrectly concluded by the first appellate Court, without any basis, viz. pleadings or evidence, as the case may be. Nowhere in the plaint, it is said that as

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

surviving co-parceners, the deceased first plaintiff and Anguswamy inherited the entire property, after the death of their two brothers and thereafter, Angusamy Reddy sold his half share in the suit properties to the deceased first plaintiff and in this view, the deceased first plaintiff was entitled to the entire suit property. Admittedly, the first defendant is the daughter of late Munusamy Reddy. If there was a division in the family, during the lifetime of the brothers, then, the question of survivorship will not come to the aid of the plaintiffs, to claim absolute right over the suit properties and the Law of Succession, as it stood then, would operate.

14. The learned counsel for the appellants would submit that even after the remand, the plaintiffs have not established the actual date of death of Munusamy Reddy, as if he died prior to 1944 and in this view, excluding the first defendant, from inheriting the properties, is not legally sound. It is the further and main submission of the learned counsel for the appellants that even as per the materials placed on the side of the plaintiffs, it is well established that there was severance in the status of the family or in other words, there was division and this being the position, the question of survivorship will not come to the aid of the plaintiffs, to claim the entire suit property.

15. Responding to the above submissions, the learned counsel for the respondents/plaintiffs would submit that Munusamy Reddy died on 25.11.1935, as proved under Ex.A.6 and therefore, as survivor, the deceased first plaintiff should have inherited the interest of Munusamy Reddy also in the property. In this context, we have to see, how a person could claim right of survivorship.

16. In a Mitakshara joint family, the doctrine of survivorship is recognised, so long as the family remains undivided, thereby enlarging the share of a surviving member, after the death of a co-parcener. Therefore, it is to be held, when there was severance in status or division in the family, the devolution, by survivorship, will not come into operation. The Right Honourable Sir Dinshah Fardunji Mulla, popularly known as D.F.Mulla, in the 'Principles of Hindu Law', 12th Edition (1960), in Section 34 (2) in Chapter IV, while dealing with 'Devolution of property according to the Mitakshara law', has said:

> "(iii) If the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by succession according to the order given in § 43(z)."

thereby survivorship is not recognised.

17. In KALYANI (DEAD) BY L.Rs. vs. NARAYANAN AND OTHERS (1980 SCJ 332), a three Judge Bench of the Apex Court has ruled that if it is shown by an unequivocal intention, which brought to surface about the disruption of a joint family status, that will put to an end to the co-parcenery, with right

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

of survivorship and such separate member holds, from the time of disruption of joint family, as tenant-in-common. In paragraph No.10 of the judgment, it is held as under:

> "Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate in respect of separating member or members and thereby puts an end to the coparcenery with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of share of such member. It goes to his heirs displacing survivorship."

On the basis of the above principle, in this case, the dates of death of two brothers viz. Munusamy Reddy and Ramu Reddy are relevant and equally, whether there was a division in the family also.

18. I have extracted pleadings, to show how the deceased first plaintiff claimed absolute right over the suit properties, indicating, to some extent, division also, though not clearly stated in unambiguous terms. But, the documents relied on by the plaintiffs and the oral evidence adduced by the deceased first plaintiff, as P.W.1, make it abundantly clear, that there was severance in the joint family, disrupting the coparcenery and therefore, as ruled by the Apex Court, survivorship should have come to an end. Unfortunately, the first appellate Court, proceeded on the presumption that surviving brothers, viz. the deceased first plaintiff and Angusamy, as survivors, had inherited the shares of other two brothers and proceeded further on the assumption that under Ex.A.1, Angusamy had sold his half share in the properties to the deceased first plaintiff, thereby making him the absolute owner to the entire extent. By going through the pleadings extracted above, as well as carefully scanning the recitals available in Ex.A.1 and evaluating the oral evidence of P.W.1, I am unable to affix my seal of approval to the conclusions arrived at by the learned Subordinate Judge, whereas I am constrained to differ, since there was no proper appreciation and proper conclusion also.

19. Ex.A.1 is the sale deed executed by Angusamy and his son in favour of the deceased first plaintiff Chengappa Reddy, on 7.7.1977. This document recites that there was partition in the family and the properties covered in the said sale deed were allotted to his (their) share and the relevant portion in Tamil reads:

> "எங்கள் பாகத்திற்கு வந்து எங்கள் அனுபவ சுவாதீனக் கைப்பத்தில் இருந்து வரும்...."

thereby meaning, the properties were partitioned and enjoyed separately. In the document, which is relied on by the plaintiffs, there is no indication, when the division had taken place, whether it is after the commencement of Hindu Succession Act, 1956 came into force or before that. Since the deceased first Plaintiff had claimed survivorship, it is for him to plead

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

and establish, that there was no division in the family and there was no severance in the co-parcenery and therefore, before the coming into force of the Hindu Succession Act, by survivorship, he and another brother Angusamy inherited or augmented the shares of other two deceased brothers and thereafter, divided the properties and Angusamy had sold his half share. My endeavor, by scanning the plaint, in search of the above averments ended in vain. On the other hand, the plaint would read, as if the deceased first Plaintiff had inherited the shares of two brothers viz. Munusamy Reddy and Ramu Reddy and purchased the share of Angusamy Reddy, which must be incorrect factually, as well as legally.

20. The oral evidence of P.W.1, who is competent to speak about the division or no division in the family, is also not helpful to buttress his case. P.W.1 was examined on 5.7.1982. In the examination-in-chief itself, P.W.1 would state that they have divided the ancestral properties orally. It is not his case that at the time of the said oral division, Munuswamy Reddy was not alive. Evidence would read, only after division, Munuswamy Reddy died, about 50 years ago. Assuming Munuswamy died in the year 1935, one thing is clear from the oral evidence of P.W.1, that even during the lifetime of Munuswamy itself, partition might have taken place and that is why, Angusamy Reddy also reiterated the same, of course, without reference to the year about the actual division and allotment of the property.

21. P.W.1 would admit, after the death of Ramu Reddy, about 40 years ago, he discharged the debt incurred by him and enjoyed his property. It is his further case that his wife had executed a settlement deed in his favour, though the document is not produced. If this evidence is to be accepted, that would mean that there might have been partition, even during the lifetime of Munuswamy Reddy and Ramu Reddy and then only, execution of settlement deed by the wife of Ramu Reddy would arise for consideration, as admitted by P.W.1. If there was no division during the lifetime of Ramu Reddy and Munuswamy Reddy, certainly, Ramu Reddy's wife would not have had any right in the co-parceneray to execute a valid settlement deed. The admission of P.W.1, that there was oral division and wife of Ramu Reddy executed a settlement deed and pursuant to the same, he enjoyed the said property, would suggest that the survivorship, pleaded by the deceased first plaintiff, must be incorrect. The above conclusion is enlightened by the further admission of P.W.1. When he was examined on 13.7.1982, P.W.1 has categorically admitted, once again, about the oral division and not only that, right was also claimed under Ex.A.5.

22. Ex.A.5 is dated 20.5.1949. This document recites that there was a partition in the family and the properties mentioned in this document were allotted to the share of her husband, by name Ramu Reddy. The boundary recitals also would suggest that other brothers were also allotted the shares. If we read Ex.A.5 coupled with Ex.A.1, supported by the oral evidence of P.W.1, the irresistible conclusion that could be drawn by any Court must be that there was actual division or severance in the joint family and this being the position, as pointed out supra, under law, one of the brothers viz. the deceased first plaintiff, is not entitled to claim

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

absolute title over the suit property, by survivorship, which was not available, since the properties were divided during the lifetime of all the brothers. Unfortunately, the learned Subordinate Judge, has not read the papers, but proceeded on the presumption that there was no division in the family and the deceased first plaintiff acquired half share by survivorship, as well as by succession and he purchased the remaining half, which is incorrect.

23. If Ex.A.1 is to be construed as the document conveyed half share in the suit property in favour of the deceased first plaintiff, the extent must be half, which is not so, as seen from the description of the property also. A document of the year 1949 (Ex.A.5) relied on by the plaintiffs makes it abundantly clear that shares were allotted or extents were allotted to Ramu Reddy in S.Nos.151/8, 152, 25 and 164/2, which are the subject matter of the suit, though having sub-divisions.

24. In the light of the above discussion, it is to be held that there was division in the family and Munuswamy Reddy and Ramu Reddy separated themselves from other co-parceners at the time of their death and therefore, the shares so obtained by them under the division, certainly, would pass on to their heirs, by succession, and not by survivorship upon the surviving brothers. The deceased first Plaintiff, suppressing all the above facts, misleading the Court, obtained a decree, which is liable to be set aside.

25. In this case, whether Ex.A.6 represents the correct date of death of Munuswamy or not, may not have much significance, in view of my findings supra. The first appellate Court has held, accepting the oral evidence of the parties and drawing presumption under law, that Ex.A.6 is true and that will prove the date of death of Munuswamy Reddy as 25.11.1935. Assuming it is correct, that alone will not give any absolute right over the suit properties to the deceased first plaintiff, to be inherited by other plaintiffs viz. the respondents herein. Therefore, it is unnecessary for us to dwell upon Ex.A.6, to find out its validity or correctness, as the case may be. For these reasons, the lower appellate Court is not justified in decreeing the suit, when the deceased first plaintiff Chengappa Reddy is only one of the four brothers, as if he had inherited the shares of two brothers viz. Munuswamy Reddy and Ramu Reddy, excluding the others and ignoring the division of co-parceners, as established. Therefore, it is to be held, as rightly put it in Substantial Question No.2, the lower appellate Court fell into an error, which is to be rectified by allowing this Appeal, answering these two Substantial Questions of law accordingly.

The result, therefore, is the appeal is allowed, setting aside the decrees and judgments of both the Courts below, regarding the declaration and injunction granted in respect of items No.1 to 9 of the suit properties. Thus, the suit in O.S.No.593 of 1981 on the file of the District Munsif, Ponneri is dismissed, in respect of Items No.1 to 9 of the suit properties. So far as the Item No.10 of the suit properties is concerned, the suit is decreed, granting the reliefs of declaration and injunction, as prayed for.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

However, considering the facts and circumstances of the case, parties are directed to bear their respects costs in this appeal.

Rao

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

1.The Subordinate Judge,Tiruvellore.

2.The District Munsif,Ponneri.

Copy To:

The Record Keeper, VR Section, High Court, Madras.

+ one cc to Mr.A.Subramanya Iyer, Sr.No.40939.
+ one cc to Mr.T.R.Rajaraman, Sr.No.41068.

HRP (CO)
RSM/26.9.2006

S.A.249 of 1995

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/